

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**HOPE COMMUNITY, INC.
Employer**

- and -

CASE NO. 2-RC-23016

**LOCAL 338, RETAIL, WAREHOUSE, DEPARTMENT STORE UNION,
Affiliated with the United Food and Commercial Workers Union
Petitioner**

DECISION AND DIRECTION OF ELECTION

Hope Community, Inc., herein the Employer, is a not-for-profit community-based neighborhood preservation corporation located in East Harlem. The Employer procures financing for, and constructs, markets and manages a diversified housing portfolio for low and moderate income households. The Property Management Division is responsible for the operation and physical management of about 80 buildings. Local 338, Retail, Warehouse, Department Store Union, affiliated with the United Food and Commercial Workers Union, herein the Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The petitioned-for unit includes all full-time and part-time maintenance employees, including superintendents, assistant superintendents and porters, but excluding zone superintendents, assistant zone superintendents, drivers, office clerical employees, guards and supervisors as defined in the Act. The Employer contended that the only appropriate unit included assistant superintendents and porters but excluded the superintendents as supervisors.

Upon the petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter¹ and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that Hope Community, Inc., a corporation with its principal office located at 174 East 104th Street, New York, New York, is a non-profit organization engaged in providing community and neighborhood development services. Annually, in the course and conduct of its operations, the Employer purchases goods valued in excess of \$50,000 directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Local 338, Retail, Warehouse, Department Store Union, affiliated with the United Food and Commercial Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

¹ The briefs filed by the Petitioner and the Employer herein have been duly considered.

5. Petitioner in its petition seeks to represent all full-time and regular part-time maintenance employees, including superintendents, assistant superintendents and porters, excluding zone superintendents, assistant zone superintendents, drivers, office clerical employees, professionals, guards and supervisors as defined by the Act. The Employer contends that the superintendents are all supervisory employees and should not be included in the unit.

As evidenced at the hearing and in the briefs, the parties disagree solely on the scope of the unit and specifically on whether the superintendents should be excluded as supervisory. The Union maintains that the superintendents, who are merely more experienced workers, perform the same routine, basic maintenance and janitorial work as the assistant superintendents and the porters. The Employer, to the contrary, asserts that the superintendents have the authority to recommend discharge, layoff, discipline and assign work. The Employer further asserts that the superintendents grant time off, adjust grievances and evaluate employees and therefore, they are supervisors under the Act. While conceding that the supervisor-to-employee ratio is high, the Employer argues that its unique structure requires this arrangement because the buildings are spread throughout upper Manhattan. I have considered the evidence and the arguments presented by the parties on these issues, and as discussed below I find that the unit petitioned-for by the Petitioner is an appropriate unit because the Employer has failed to prove that the superintendents possess supervisory indicia and therefore, they should be included in the unit.

To provide a context for my discussion, I will first provide an overview of the Employer's operations.

I. THE EMPLOYER'S STRUCTURE

Dafne Panyiotou, the director of property management, oversees the maintenance and marketing departments. The field-based work of the property management division is segmented into two zone teams that provide a full range of services to tenants in a particular geographic area. Specifically, Zone A covers the blocks from 96th Street to 112th Street and Zone B stretches from 113th Street to 123rd Street on the east side of Manhattan.

Each zone has a property manager and two assistant property managers,² who are supported by zone supervisors and assistant zone supervisors whose functions are to ensure that the properties are well maintained. The duties and responsibilities of the zone supervisors and the assistant zone supervisors appear to be indistinguishable. In that regard, it appears that their main function is to distribute supplies and work orders for repairs to the superintendents throughout the two zones.

Presently, Pat Moorehead is the property manager in Zone A and her assistants are Arledi Fernandez and Maria Martinez. The Zone A supervisor is Edgar Hernandez and the assistant zone A supervisor position is currently vacant. In Zone B, Iris Marines is the property manager and the two slots for assistant property managers are currently vacant. The Zone B supervisor position was recently filled by Fernando Negrón³ and his assistant is Louis Arevalo.⁴

² The functions and responsibilities of the property managers and their assistants were not fully developed on the record. The superintendent job description offered in evidence by the Union indicates that the superintendents report to their zone supervisor and "the property manager will also work closely with the building superintendent." Further, superintendents Riofrio, Ruiz, Guzman, Olivares and Mercado testified that they receive work orders directly from the property manager, as well as, the zone supervisor and assistant zone supervisor.

³ It appears that the previous zone B supervisor was Jack Zowotsky. Negrón was promoted to zone B supervisor in about June 2005.

⁴ Arevalo has quickly ascended from his position as porter upon his hire in January 2005 to his promotion in about June 2005 to assistant zone supervisor.

Twelve superintendents report to Hernandez in Zone A. Six superintendents report to Negron and Arevalo in Zone B. The primary duty of the superintendents is to oversee the assigned building and the surrounding property on a daily basis and to provide 24-hour coverage in case of emergencies.⁵ In addition to general maintenance, they are responsible for completing repairs as detailed on the work orders generated from management. Any serious repair problems are reported to the zone supervisor, the assistant zone supervisor or the property manager who decides whether to utilize an outside contractor. The superintendents are required to provide access to the buildings for contractors, inspectors and vendors with respect to repairs of the boiler, elevator and intercom systems. Further, they inform the zone supervisor of any supply needs, such as garbage bags and light bulbs.⁶

Most of the buildings have an assistant superintendent and/or a porter. Zone A has nine assistant superintendents and five porters. Zone B has six assistant superintendents and five porters. The job description of the assistant superintendent and the porters is the same – they help the superintendent make repairs and perform basic janitorial work.⁷ Former employee Hector Gonzalez testified that when he worked as an assistant superintendent, zone supervisor Jack Zowalsky gave him a work schedule of specific duties which he carried out every day, such as collecting the garbage, cleaning the sidewalk, mopping, sweeping and cleaning the windows.

⁵ It appears that the Employer has revised the job description of the superintendent, however, the superintendents testified that they either never received a job description or that they received an older version of the job description which omits any reference to supervision of the assistant superintendents.

⁶ While human resource manager Awilda Pratts claimed that the superintendents have the authority to purchase supplies from approved vendors, the record demonstrates the zone supervisors order and distribute supplies in bulk.

⁷ While Pratts claimed that she gives the job description to all new hires, the document in evidence appears to be a draft containing editorial comments by the drafter.

II. TERMS AND CONDITIONS OF EMPLOYMENT

The superintendents earn about \$15 per hour and receive rent-free apartments, plus a utility allowance.⁸ The assistant superintendents earn between \$11.50 and \$12.50 per hour and are sometimes provided with an apartment depending on the number and the proximity of assigned buildings in the grouping. As an example, assistant superintendents Joseph Rivera and Amauris Polonia received live-in apartments, in addition to the superintendents.⁹ The average pay for porters is about \$10 per hour.

The superintendents wear the same uniforms as the assistant superintendents and the porters which is a light blue shirt and dark blue pants. Finally, the parties stipulated that these three classifications have the same benefits including, health care, vacation and holiday pay.

III. JOB DUTIES AND EMPLOYEE INTERACTION

The workload varies to some extent depending on the size, location and kind of facilities or groupings within the Employer's system that is being discussed. Especially with respect to Zone A, the superintendents are responsible for buildings that differ greatly in size and type. As an example, Erick Jimenez is the superintendent at the Jennie A. Clark Homeless Shelter which consists of five buildings where the apartments constantly turnover. Accordingly, the Employer assigned four assistant superintendents and two porters to maintain the properties, in addition to the superintendent.

Newly appointed Zone B supervisor Fernando Negron's work experience is based largely on his work in the Zone A system. When Negron was first hired as a superintendent, he worked at the 104th Street grouping. Shortly thereafter, he was

⁸ Jesus Rosas is the only superintendent who does not have an apartment but he is slated to get one. Further, it appears that the zone superintendents and the assistant zone superintendents may also have the benefit of rent-free apartments.

⁹ Nonetheless, the Employer's general policy is that assistant superintendents do not receive rent-free apartments.

transferred to the superintendent position at the Jennie A. Clark Homeless Shelter, herein called Clark, where his responsibilities significantly changed. While the shelter had fewer buildings than his previous post, the work load was greater due to the high demand for repairs caused by the high turnover rate of the tenants. Negron testified that there are no other buildings in the Employer's system, either in Zone A or Zone B that are similar to Clark.

While Negron in his testimony emphasized Clark's uniqueness, the 1622 Madison Avenue grouping (also in Zone A) is also somewhat unusual. There, superintendent Victor Guzman is responsible for buildings that are located in an area which requires more janitorial work due to the area conditions. Accordingly, the Employer has assigned two assistant superintendents and one porter to work with the superintendent.

On the other end of the scale, five of the Employer's groupings are comprised of small buildings which are clustered in the same neighborhood. The superintendents of these groupings, therefore, do not require additional help from assistant superintendents and porters. As an example, superintendents Daniel Olivares, George Riofrio, Luis Mercado, Freddy Ramirez, as well as, the vacant superintendent position at East 96th Street, work alone.¹⁰

Of the remaining sets, four of the Employer's groupings have a superintendent, an assistant superintendent and a porter. Seven groupings operate with only a superintendent and an assistant superintendent or a superintendent and a porter.

In buildings where the superintendents work with either one assistant or one porter, the record demonstrates that the workers share the daily tasks. In that regard, superintendent Edwyn Guzman testified that in his 90-unit building, he performs the

¹⁰ Olivares and Riofrio have about 30 units in their respective buildings and they have been specifically instructed to help each other when necessary.

cleaning duties and repairs along side the assistant superintendent Carmerino Suarez. Similarly, superintendent Richard Ruiz testified that he performs the same work as the assistant superintendent Reinaldo Rodgers for the 104 units that comprise his grouping of five buildings. Finally, superintendent Pedro Felipe testified that in his ten-story building for senior citizens, he performs much of the same work as his helper, the assistant superintendent Jacinto Lugo. Felipe handles the more complicated repairs because he is more experienced.

IV. AUTHORITY OF SUPERINTENDENTS

A. Discharge

Human Resources manager Pratts claimed that superintendents have the authority to recommend the discharge of employees. As an example, she testified that Victor Guzman, the superintendent at the 1622 Madison Avenue grouping, recommended that an employee be suspended and fired. The zone supervisor followed his recommendation and fired the employee. However, Pratts could not recall the name of the employee who was fired, why Guzman recommended discharge, or whether the zone supervisor conducted an independent investigation. She, nonetheless, asserted that the superintendent's recommendations on termination decisions are followed 90% of the time. Neither zone supervisor Hernandez nor Victor Guzman testified at the hearing. No documentary evidence was offered regarding the employee's termination.

Arevalo also asserted that the superintendents have the authority to recommend termination and suspension but failed to cite any examples where this authority had been exercised.

B. Layoffs

In August 2004, the Employer laid off about twelve to fifteen employees. According to Pratts, the superintendents made specific recommendations regarding which employees should be slated for layoff. The zone supervisor relayed to the

property manager the list of names supplied by the superintendents. Pratts maintained that the property manager and the zone supervisors made the final lay off decisions with the guidance of the superintendents. No other evidence was presented in this regard.

On the contrary, Edwyn Guzman, a superintendent testified that he had no involvement with the layoffs.

C. Discipline

Pratts also stated that superintendents have the authority to discipline employees, either verbally or in writing. Further, she asserted that superintendents have the authority to send employees home for extreme conduct, like a physical altercation. She also noted that superintendents report any disciplinary action that they have initiated to the zone supervisor. No documentary evidence in support of this proposition was introduced in evidence.

According to zone supervisor Arevalo, the superintendents have the authority to verbally discipline the employees. As an example, he stated that superintendent Amauris Polonia recommended that porter Freddy Rivera be disciplined for no call/no show. Rivera was verbally warned, put on probation and an infraction was placed in his file. In another instance, superintendent Refugio Jimenez reported that a porter, Ernie Batista, was a no call/no show. Jimenez recommended a verbal warning which Arevalo issued to the employee. Both Arevalo and superintendent Richard Ortiz testified to an incident involving a porter named Miguel Conception. Ortiz reported to Arevalo that Conception failed to wear his uniform and recommended a verbal warning. Arevalo issued a verbal warning to the porter.

While Arevalo claimed that he follows the recommendations of the superintendents 90% of the time, he also conceded that he thoroughly investigates an incident where a superintendent recommends discipline. The investigation consists of

listening to both versions of events and then he decides the appropriate disciplinary action.

Moreover, Arevalo maintained that as a general rule, the assistant zone or the zone supervisor must sign off on the discipline. In the exceptional circumstance, such as extreme behavior like a physical altercation or intoxication, the superintendent can suspend without prior approval. In that regard, Arevalo claimed that he conducted one-on-one meetings with superintendents to inform them that they have this authority.

Superintendents Ruiz, Guzman and Felipe testified, however, that they were neither informed of their authority to discipline nor have they issued disciplinary warnings to employees. Instead, they testified that it is their belief that the zone supervisor alone possessed the authority to discipline.

Negron asserted, without further explanation, that during his tenure as superintendent at Clark, he recommended discharge, suspension and probation of employees and his recommendations were followed 90% of the time. The only specific incident that he recalled involved his decision to send a probationary porter home because he was nodding off on the job. Negron took this action without prior approval. When he later informed his zone supervisor, Hernandez commented that he had acted appropriately pending an investigation. The following day, Hernandez, Negron and the porter met to discuss the incident. Negron explained that the porter posed a hazard because they were working with power tools renovating a bathroom. The porter explained that he had been up all night with his sick wife who was battling cancer. Hernandez and Negron were satisfied that he was suffering from lack of sleep, instead of a narcotics issue, and the porter was paid for the day.

During the brief interval that Negron held the position of assistant zone supervisor, he claimed that superintendent Erick Jimenez constantly reported problems with a probationary employee at Clark, such as lateness and absenteeism. Negron

instructed Jimenez to write up each instance and create a record. Eventually, an incident (the nature of which was undisclosed on the record) led to the employee's dismissal. Negron testified that Jimenez reported the incident and recommended that the employee be fired. The employee was subsequently fired. No documentary evidence regarding the discharge was offered in evidence.

D. Assignment of Work

A work order form is generated by the property manager or by the zone superintendent or the assistant zone superintendent.¹¹ The work orders are maintained in the office by the zone supervisor which provides a detailed record of the basic maintenance work that has been performed throughout the system.

The property manager, the zone superintendent and the assistant zone superintendents distribute the work orders to the superintendents.

Again, during the period that Negron was a superintendent at the shelter, he assigned work to the assistant superintendents and the porters. In the smaller buildings, however, the superintendent and his assistant work together or just divide up the work orders. Felipe and Guzman work with experienced assistants who do not require instruction. In other buildings, the superintendent assigns the work based on skill level.

It appears that the superintendent signs the work order form to verify that the work was done properly and gives the paperwork to the zone supervisor. The work orders offered in evidence by Petitioner indicate that the superintendent and his assistant signed as workers and the zone supervisor Hernandez signed as the supervisor verifying work. The more recent work orders offered by the Employer are signed by the porters and assistant superintendents as workers, which indicate that they actually performed the repairs.

¹¹ Occasionally superintendents create work orders which are at the tenant's direct request or where an emergency situation arises.

E. Transfers

The Employer's witnesses testified that the superintendent has the authority to instruct a porter to stop working in one building and perform work in another building within his assigned grouping of buildings. However, no testimony was adduced regarding specific incidents where this occurred. The record establishes that the superintendent cannot transfer employees from his assigned buildings to other groupings in the zone. Rather, when the superintendent needs additional manpower, the zone or assistant zone supervisor arranges for additional porters or assistant superintendents to report to another area within the zone. Ortiz conceded that he had no input into the decision to transfer the porter from a different site to his assigned buildings. Negron testified that the superintendent has authority to switch schedules among employees but no corroborative or record evidence was introduced.

F. Time off

According to Pratts, although porters and assistant superintendents request time off with the superintendent first, final approval is a collaborative decision between the superintendent and the zone supervisor. However, it is the zone supervisor who has the final word. Arevalo corroborated that the superintendent makes an initial decision on whether to grant or deny the employee's request depending on the work load and subsequently confers with Arevalo. Negron testified that when he was a superintendent at Clark, the assistant superintendents and the porters requested time off from him. He reported that about 30% of the time, the zone supervisor overruled his recommendations. He also stated that the ultimate decision was made by the assistant zone or zone supervisor or the property manager and he was merely a conduit between the workers and the zone supervisor.

While Ortiz testified that he granted the assistant superintendent's request for a day off and covered his position that day, another superintendent Pedro Felipe testified

that he did not have the authority to grant time off. Felipe's assistant superintendent Lugo merely informed him that he wanted time off because they coordinate their vacations so that the building has coverage. The "request for leave" form submitted by the Union supports that Lugo's vacation request was approved by zone supervisor Hernandez and property manager Moorehead. No other "request for leave" forms were offered in evidence. Superintendents Riuz, Guzman, Mercado and Hector Hernandez testified that the zone supervisor grants or denies time off and arranges for coverage.

G. Evaluations

According to Pratts, the employees receive annual evaluations whereby the superintendents make recommendations for raises. If the superintendent gives a negative evaluation, the employee could be put on probation or terminated. For positive evaluations, the employee could get rewarded with a raise or a promotion. Negrón corroborated that as the superintendent at Clark, he evaluated all the employees based on their time at the company and their work performance. The evaluations are completed by the superintendent and sent to the zone supervisor who sends it to management.

The documentary evidence submitted by the Employer indicates that evaluations are signed by superintendents, but only one employee was recommended for a salary increase. Moreover, this appraisal was signed by zone supervisor Hernandez and Maria Ovalles, another reviewer whose name or position with the Employer does not otherwise appear in the record.

While Felipe, Ruiz, Guzman and Olivares testified that the zone supervisor evaluates the assistant superintendents with whom they worked, they conceded that the zone superintendent asked their opinion regarding the quality of the worker's performance.

H. Promotion

Pratts stated that superintendent Rogelio Ramirez verbally recommended assistant superintendent Amauris Polonia for a promotion to a superintendent slot but was unable to offer any details of this event. The property manager took the recommendation into consideration as one factor in her decisions regarding the reorganization of a grouping. Pedro Felipe testified that he did not have the authority to promote and has never promoted an employee. He claimed that while he may give his opinion, he is just the super.

I. Grievances

As superintendent of the shelter, several grievances were brought to Negron's attention. His practice was to ask the employees to describe the problem and depending on the severity of the situation, he would make a decision without the zone supervisor's assistance. As an example, regarding a grievance on the inequitable distribution of work, Negron changed the work schedules so that one employee, Edwyn Burgos, would not have to mop and sweep five buildings while the other employees were far less busy.

J. Percentage of time doing work:

While extensive testimony was elicited regarding the percentage of time that the superintendents spend performing maintenance work compared with the amount of time spent supervising employees, Negron maintained that this construct is misplaced in the context of more experienced superintendents who are working with only one other employee. With respect to repairs, the superintendent is more experienced than his assistant so that when performing the work, he trains his assistant. Thus, the superintendent is simultaneously doing and "supervising" the work. The record demonstrates that the janitorial work performed every morning by the superintendent and his assistant or the porter is routine and repetitive in nature.

Further, the record is clear that the only paperwork involves the superintendents completing and signing off on work orders which are submitted to the zone supervisor.

K. Apparent Authority

Upon hire, Pratts testified that she informs the assistant superintendents and the porters that the superintendent is their supervisor.¹² Further, she notifies the zone supervisor to escort the new employee to the assigned building and introduce him to the superintendent as “the supervisor.” Ortiz corroborated that Negron and Arevalo recently introduced him as “the supervisor” to the new assistant superintendent, Jose Gonzalez.

Apart from Ortiz, all of the other superintendents asserted that the zone supervisor is “the boss.” Moreover, the record demonstrates that the Employer failed to inform the superintendents of their duty to supervise the assistant superintendents and the porters. In that regard, Pedro Felipe testified that when he was promoted from a porter to a superintendent, Hernandez gave him the key to his apartment and told him to clean, mop, do repairs and dispose of the garbage. The only thing that changed was his salary. Similarly, Edwyn Guzman testified that when he was promoted to superintendent two years ago, the Employer did not inform him of any supervisory responsibilities. Instead, he was just told to maintain the buildings and take care of the repairs.¹³ Further, Luis Mercado, who works alone, testified that when he was promoted from assistant superintendent to superintendent, Hernandez told him how to do some repairs and take care of the garbage and instructed him to mop and sweep the buildings.

V. ANALYSIS

It is well established that a party seeking to exclude an individual or group of employees based upon their status as supervisory employees bears the burden of establishing that such status, in fact, exists. *NLRB v. Kentucky River Community Care*,

¹² No evidence was adduced that the superintendents are involved in the hiring process.

¹³ Both Felipe and Guzman work with assistant superintendents.

121 S. Ct. 1861, 1866-1867 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998). Thus, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, we will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Further, the Board has cautioned that in construing the supervisory exemption, it should refrain from construing supervisory status “too broadly” because the inevitable consequence of such a construction is to remove the individual from the protections of the Act. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Phelps Community Center*, *supra*, at 492 (1989). When evidence is inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *Supra* at 490.

Applying the foregoing standards to the facts of this case, I find insufficient support in the record to conclude that the superintendents are statutory supervisors. The record does not establish that they exercise supervisory authority with respect to discharge, layoff or discipline or that they effectively recommend such actions. The Employer offered conclusory testimony with insufficient documentary support for its assertion that the superintendents have any effective role in discharge or lay off determinations. Likewise, no documentary evidence supports that the superintendents disciplined employees. Instead, their disciplinary authority is limited to verbal warnings which are thoroughly investigated by the zone supervisors and assistant zone supervisor. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965)(not a supervisor if complaints or reports of inefficiency are investigated independently by higher management). At best, the superintendents’ authority to issue warnings on their own initiative appears to be limited to circumstances of extreme misconduct. *Chevron Shipping Co.*, 317 NLRB 379 (1995) (authority to order intoxicated employees to leave

was not disciplinary). When the record is considered as a whole, the Employer has failed to show that any recommendations of the superintendents have a definite and severe effect on employment status. Accordingly, it appears that the superintendents merely perform a reporting function that is not supervisory under the statute. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Pepsi-Cola Bottling Co.*, 154 NLRB 490 (1965); *Misericordia Hospital Medical Center v. NLRB*, 623 F. 2d 808, 817 fn. 20 (2d Cir. 1980) (authority to do no more than orally counsel and reprimand employees is not supervisory); *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (mere authority to effectively recommend warnings that have no tangible effect on an employee's job status is not sufficient for supervisory status).

As with every supervisory indicium, assignment of work must be done with independent judgment before it is considered to be supervisory under Section 2(11) of the Act. Thus, the Board has distinguished between routine direction or assignments of work and that which requires the use of independent judgment. *Laborers International Union of North America, Local 872*, 326 NLRB No. 56 (1998); *Azusa Ranch Market*, 321 NLRB 811 (1996). The Board has held that only supervisory personnel vested with genuine management prerogatives should be considered supervisors, not straw bosses, lead men, setup men and other minor supervisory employees. *Baby Watson Cheesecake*, 320 NLRB 779, 783 (1995); *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970).

Based on the record, any assignments made by the superintendents were minimal and routine in nature and do not require the exercise of independent judgment and, therefore, do not rise to Section 2(11) status. The duties of the porters and assistant superintendents are established by the zone supervisors and the property manager. In this connection, it is also noted that the porters and assistant superintendent's jobs require no particular instruction; instead, they are merely repeating tasks and duties that they were told to perform when hired. Accordingly, the

superintendent's limited role in parceling out assignments to employees who know how to perform the work is not the kind of direction that requires independent judgment. *Cassis Management Corporation*, 323 NLRB 456 (1997).

Moreover, the Employer failed to provide any details regarding how often the porters and assistant superintendents actually break with routine, how much deviation is allowed or how much discretion is actually involved in telling them to perform their assigned functions. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Somerset Welding & Steel*, 291 NLRB 913 (1988). Rather, the record indicates that the porters and assistant superintendents perform largely the same duties on a routine basis everyday. Accordingly, the superintendents acted, at most, as leadmen in handing out work orders.

The Employer also argues that job descriptions were given to the assistant superintendents and establish that employees are informed of the hierarchical authority of the superintendent. The job description for the assistant superintendent offered in evidence states "the position of Assistant Building Superintendent reports to a Building Superintendent..." The job description for the superintendent offered by the Employer states that they directly supervise the assistant superintendent, whereas the job description offered into evidence by Petitioner omits any such reference. These job descriptions have little or no evidentiary value in establishing the level of authority actually exercised by the superintendent in regard to the assistant superintendents and porters. The record fails to establish that the Employer's job description for superintendent was in fact distributed as the witnesses offered contradictory testimony in this regard. The job description for the assistant superintendent clearly has editorial comments and suggestions which indicate it is just an interim document. Whether they were provided to employees or not, I cannot conclude that the job descriptions establish

that any specific authority was granted to superintendents with respect to the work performed by assistant superintendents and porters.

The Supreme Court, in *NLRB v. Kentucky River Community Care*, *supra*, held that an individual who responsibly directs other employees with independent judgment within the meaning of Section 2(11) must have sole or significant authority over the work unit. In that regard, the standard for responsible direction and independent judgment includes evidence that the alleged supervisor has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge." Further, the evidence must establish that the purported supervisor is held accountable for the work of others. Finally, the evidence adduced must show that the individual exercises significant discretion and judgment in directing his or her work unit.

Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Property Markets Group*, 339 NLRB 199 (2003). In the instant case, as Mercado stated, the superintendents merely have more experience, not more authority than the other workers. The duties of the porters and assistant superintendents are predetermined, performed daily and routine. No significant direction of their work is either required or undertaken. *Byers Engineering*, 324 NLRB 740 (1997) (authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority).

The record does not establish that the superintendents are held accountable for the work of the assistants and porters. That they sign off on work orders to verify that the work was completed is not sufficient to establish that they are evaluated or rewarded based on their assistant's work. Further, there is a conflict in the record as to who had the authority to sign work orders and therefore, the documents are not dispositive on the

issue of responsible direction of work. Specifically, the records submitted by the Union indicate that the zone supervisor customarily signed as the “supervisor” verifying work, whereas, the Employer’s submission indicates that the work orders were signed by superintendents as the “supervisor” verifying work. Accordingly, I conclude that the work orders in evidence are of insufficient weight to establish statutory supervisory status.

Where the possession of any one of the aforementioned powers is not conclusively established or in borderline cases, the Board looks to well-established secondary indicia as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. *Training School of Vineland*, 332 NLRB 1412 (2000). To the extent that the Employer argues that secondary indicia support its argument that the superintendents are supervisors, the Employer has failed to show that any of the superintendents possess secondary indicia of supervisory authority.

With respect to the Employer’s contention that the superintendents are responsible for granting time off, their own witness testified that he merely acted as a conduit between the employees and the zone supervisor. Likewise, the overall record demonstrates that the promotions and transfers are squarely within the purview of the zone supervisor. Thus, where a “crew leader” had occasionally been consulted about an employee’s progress and an employee had been granted a raise after his crew leader had recommended the raise, these isolated instances, without more, were not regarded sufficient to establish supervisory indicia. *Highland Telephone Cooperative*, 192 NLRB 1057 (1971). Likewise, the Employer did not carry its burden of establishing that superintendents adjust grievances. Their limited authority to resolve glaring disparities in work load is insufficient to establish supervisory status. *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991).

It is well established that the ability to evaluate employees, without more, is insufficient to establish supervisory authority. This factor has been deemed unpersuasive in the absence of evidence that an employee's job was ever affected by such an evaluation. *Mount Sinai Hospital*, 325 NLRB 1136 (1998); *Williamette Industries*, 336 NLRB 160 (2001). In the instant case, the only example of an evaluation that had a direct link with an employee's wage increase was signed by two upper level management supervisors. Moreover, the other appraisals that were placed into evidence establish that they were unattended by any recommendation that would either positively or negatively affect the employees employment.

The ratio of supervisors to rank-and-file employees is a background factor which may be considered in resolving a supervisory issue. *Ken Crest Services*, 335 NLRB 777 (2001). In that regard, the Employer's claim that a single zone supervisor oversees the work of twenty-six employees is incomplete. The record reveals that the property managers and assistant property managers, along with the zone supervisors and assistant zone supervisors, regularly interact with the superintendents and are directly involved in the distribution of work orders at the various buildings. Accordingly, a team of about ten managers supervise the work of about forty workers for a ratio of about one to four.

Ostensible or apparent authority can be a basis for making the supervisory determination. However, it is well established that rank-and-file employees cannot be transformed into supervisors by merely being invested with that title. *Carlisle Engineered Products*, 330 NLRB 1359 (2000). The record overall demonstrates that the employees did not regard the superintendents as their boss. They receive the same benefits, wear the same uniform and work pursuant to the same rules set forth in the employee manual.

Finally, the Employer's claim that the instant case is factually consistent with this Region's recent decision in *Mrs. Green's of Briarcliff Manor*, 2-RC-23001, is misplaced. In that case, the managers were "in charge" of their departments and their primary duty was ordering and tracking inventory. In that regard, they had the authority to effectively recommend that the employer discontinue contracting with outside vendors. Further, their annual bonuses were tied to the department's profitability for which they were held responsible. In addition, the managers effectively recommended hire, transfer and discharge of employees. They regularly granted time off and adjusted work schedules at their discretion.

In contrast, in the instant case, the only paperwork that the superintendents deal with is limited to verifying that work orders were completed. The record overwhelmingly shows that they do not order supplies or contract with outside vendors. While the superintendents are responsible for their assigned buildings, the record evidence does not demonstrate that they effectively recommend the transfer of employees between groupings, or that they effectively recommend the hire, discharge or discipline of employees. Rather, they work side-by-side with the porters and assistant superintendents to maintain the property.

The Employer also relies on *NLRB v. Quinnipiac College*, 256 F.3d 68 (2001), wherein the Court found that the shift supervisors had statutory supervisory authority over the security guards. In that case, the Court rejected the Board's reliance on established procedures which remove the exercise of independent judgment in determining assignments and direction of employees. The facts of *Quinnipiac* are distinguishable from the instant case. In this case, the Employer presented no evidence to establish that the superintendents exercised any of the indicia of Section 2(11). Further, the evidence establishes that the individuals who possess the authority and who use independent judgment in supervising the staff are the zone supervisors, the property

managers and their respective assistants. The Employer has failed to present any evidence that the superintendent was granted or exercised any authority that would make them supervisors under Section 2(11).

In conclusion, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time maintenance employees, including superintendents, assistant superintendents and porters.

Excluded: All zone superintendents, assistant zone superintendents, drivers, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.¹⁴ Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated

¹⁴ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.¹⁵ Those eligible shall vote on whether or not they desire to be represented for collective-bargaining purposes by Local 338, Retail, Warehouse, Department Store Union, affiliated with the United Food and Commercial Workers Union.¹⁶

Dated at New York, New York
this September 26, 2005

/s/ Karen P. Fernbach
Acting Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

¹⁵ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **October 3, 2005**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

¹⁶ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **October 10, 2005**.